IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, KOLKATA
EASTERN ZONAL BENCH : KOLKATA

REGIONAL BENCH - COURT NO.2

Customs Appeal No.75366 of 2020

(Arising out of Order-in-Original No.Kol/Cus/Airport & Admn./05/2019 dated 06.03.2019 passed by Commissioner of Customs(Airport & Admn.), Customs House, Kolkata.)

M/s. M.K.Saha & Company
(145/A, Ashoke Garh, Kolkata-700001.)

...Appellant

VERSUS

Commissioner of Customs(Airport & Administration), Kolkata

.....Respondent

(Customs House, 15/1, Strand Road, Kolkata-700001.)

APPEARANCE

Shri Arijit Chakraborty, Advocate for the Appellant (s)
Shri A.K.Biswas, Authorized Representative for the Respondent (s)

CORAM: HON'BLE SHRI P.K.CHOUDHARY, MEMBER(JUDICIAL)
HON'BLE SHRI P.ANJANI KUMAR, MEMBER(TECHNICAL)

FINAL ORDER NO. 75622/2020

DATE OF HEARING : 5 October 2020
DATE OF DECISION : 19 November 2020

P.K.CHOUDHARY :

The present appeal is directed against Order-in-Original No.KOL/CUS/Airport/Admn/05/2019 dated 06.03.2019 passed by the Commissioner of Customs (Airport & Admn.), Customs House, Kolkata.

2. The facts of the case in brief are that the appellant's Customs Broker licence No.M-57; Code No.2405 (PAN-ABCFM0925F) is under suspension which has been ordered to be continued under Regulation 16(2) of CBLR, 2018 and proceeding of inquiry under Regulation 17 of CBLR, 2018 has been ordered to be instituted. The appellant preferred

a writ petition being W.P. No.145 of 2019 [M/s.M.K.Saha & Co. & Another Vs. Union of India & Ors.] before the Hon'ble High Court, Calcutta which was disposed of vide order dated 28.01.2020 granting liberty to the appellant being writ petitioner therein to prefer appeal before this Tribunal against suspension of licence. That the appellant preferred a separate writ petition being W.P. No.389 of 2019 [M/s.M.K.Saha & Co. & Anr. Vs. Union of India & Ors.] before the Hon'ble High Court, Calcutta against the Inquiry Officer appointed in the enquiry proceeding under Regulation 17 ibid in consequence of the impugned Order-in-Original. The Hon'ble Court vide Order dated 28.01.2020 also disposed of the said application by setting aside the Inquiry Report dated 19.07.2019 and directing for fresh inquiry after supplying relied upon documents to the appellant being petitioner therein. Hence, the present appeal before this Tribunal.

3. The learned Advocate appearing on behalf of the appellant submitted that on 21.08.2018, the officers of Directorate of Revenue Intelligence (in short "DRI"), Kolkata had intervened into the consignments and conducted 100% examination of the goods. However, the business of the appellants was not disturbed by DRI, Kolkata. On 07.09.2018, the officers of DRI, Kolkata called the partner of the appellants over phone and directed him to attend the office of DRI, Kolkata. Immediately thereafter, the partner of the appellants firm duly attended the office of DRI, Kolkata when he was asked to inform the activity of Babul Dey in connection with those 4 Shipping Bills of M/s.Skivvies Textile filed during 08.08.2018 and 09.08.2018 respectively through the petitioner firm. In reply, the partner of the petitioner firm had duly informed that all acts and performances required on the part of CB in respect to the said 4 Shipping Bills were duly made by the employees of the CB and Babul Dey had only procured the job. Suddenly on 08.02.2019, at about 5.30 pm -6.00 p.m., it was found that processing of Shipping Bills and/or Bills of Entry filed by the CB has been stopped without any prior notice or information to the appellants and from the EDI system, it came to the

knowledge of the appellants that at the status column of one job, it is recorded as "Negative Acknowledgement Received – Error Description : CHA Licence Suspended;". That the appellants immediately knocked the door of the Customs authorities since there was no such order of suspension of their licence and as such, on that ground, their job could not have been marked as 'negative' at status column. Even the CB Section and/or its Assistant Commissioner or Deputy Commissioner could not provide for any such order of suspension of their licence as on 08.02.2019. That on 13.02.2019, the appellants received one letter dated 11.02.2019 issued by the Customs authority which was directed to the appellants informing that F/G/H/B Pass (Card) issued by the department to the employees of the appellants have been cancelled due to suspension of the CB Licence of the appellants. On 14.02.2019, the appellants received another letter dated 11.02.2019 which was directed to M/s.Behag Overseas and a copy thereof was provided to the appellants wherein it is informed that the 'G' Card of Babul Dey has been cancelled. That on 14.02.2019, the appellants further received a copy of Customs Broker Circular No.08/2019 dated 08.02.2019, a Corrigendum dated 11.02.2019 to the said CB Circular and a notice dated 12.02.2019 for post decisional personal hearing. By the Circular dated 08.02.2019, the CB Licence of the appellants has been suspended and by the Corrigendum dated 11.02.2019, it is corrected that the suspension of the CB Licence of the appellants has been made in terms of Order passed by learned Commissioner of Customs (Airport & Administration), Customs House, Kolkata and the 'G' Card of Babul Dey has also been suspended. The appellants were directed to surrender identity cards of their employees to the learned Assistant Commissioner of Customs, Customs Broker Section, Customs House, Kolkata. By the notice dated 12.02.2019, the appellants were intimated that the learned Commissioner of Customs has been pleased to grant the post decisional personal hearing on 21.02.2019 at 13.00 hrs. in the matter of order of suspension vide CB Circular No.08/2018.

4. Learned Authorized Representative appearing on behalf of the respondent department, reiterated the discussions and findings of the lower authorities.

5. Heard both sides and perused the appeal records.

6. We find that Shri Babul Dey joined the Customs Broker firm in July 2018, but the Customs Broker did not get him duly approved by the Deputy Commissioner of Customs or Assistant Commissioner of Customs. It is alleged that M/s.M.K.Saha & Company has violated the provision of Regulation 10(B) of CBLR, 2018. It is the case of the department that since the appellant was not engaged as a Customs Broker by Shri Sumit Saha, Proprietor of M/s.Skivvies Textile.

7. On perusal of the records and documents and considering the submissions made on behalf of parties, it is apparent that in the present case, the licence of CB was suspended under CB Order No.12/2019 dated 18.2.19. However, prior to the suspension, a Customs Broker Circular No.08/2019 dated 8.2.19 was issued in connection with the issue under consideration. The suspension was ordered by the Customs Authority on the basis of investigation report dated 31.1.19 issued by the Directorate of Revenue Intelligence, Kolkata Zonal Unit with respect to one export consignment of M/s. Skivvies Textile wherein apparently, scrap leathers of very low value were attempted to be exported as “Vegtan Leather Shoe Sole Components”. The DRI Authority had intercepted the same and during the course of investigation allegedly it is found that the CB had failed to fulfil their obligations under Regulation 10(b), 10(d), 10(e) and 10(n) of CBLR, 2018 by not verifying the correctness of export consignment and not collecting the authorisation and KYC from the exporter directly. It is also alleged that they had allowed one unauthorised person viz. Shri Babul Dey to transact on their licence. Such findings led the Commissioner of Customs (Airport & Admin.), Customs House, Kolkata to confirm such suspension of CB licence under Regulation 16(2) of CBLR, 2018 and also ordered for initiating

proceedings for revocation of licence under Regulation 17 of CBLR, 2018 vide impugned Order-in-Original dated 6.3.19.

8. It is not in dispute that the CB is under suspension since 18.2.19 i.e. for a period of more than 1 year and 8 months. The proceeding initiated under Regulation 17 of CBLR, 2018 against the CB on the basis of impugned Order-in-Original dated 6.3.19 has led to the Inquiry Report dated 19.7.19 which has been ultimately set aside and quashed vide Order dated 28.1.2020 by the Hon'ble High Court of Calcutta in W.P. No.389 of 2019 (as appearing at Annexure-'J' to the Appeal Petition). The Hon'ble High Court has further ordered for inquiry afresh after providing copies of relied upon documents to the CB. In the same Order with respect to W.P. No.145 of 2019, the Hon'ble Court has directed this Tribunal for deciding the appeal on suspension as to be filed by the petitioner therein, which is the present appeal.

9. We find that the power of suspension under Regulation 16 of CBLR, 2018 is to be exercised in appropriate cases where immediate action is necessary. It is well settled principle of law that only in appropriate cases where immediate action is necessary, suspension is required to be adhered to. In other words, suspension of CB licence cannot be exercised by the authority in a routine and mechanical manner. For invocation of Regulation 16 ibid, it is necessary for the authority to disclose the immediate necessity of exercising such power. In the present case, the alleged export consignments were procured during July, 2018 and the Shipping Bills were dated 8.8.2018 and 9.8.2018 respectively. The DRI Authority had intercepted and conducted 100% examination of goods on 21.8.18. Thereafter, the investigation went on and apparently, the CB had duly participated in the investigation before the DRI Authority. After substantial period of time, on 18.2.19, there was no 'immediate necessity' of suspension of the licence of the CB under Regulation 16 of CBLR, 2018. The Commissioner has also failed to adduce any reason of 'immediate

necessity' of exercising power under Regulation 16 of CBLR, 2018 in the impugned order. The Hon'ble High Court of Calcutta in the case of Rubee Air Freight Ltd. v/s CC (Airport & Administration), Kolkata [2010 (257) ELT 20 (Cal)] at Para 3 held that, "*The power to suspend a licence is, however, drastic and entails irreversible civil consequences for the licencee. The power to suspend thus, ought to be exercised cautiously.*"

10. In the case of N.C. Singha & Sons v/s. UOI [1998 (104) ELT 11 (Cal)], the Hon'ble High Court, Calcutta has held that, "*That order, in our opinion, is not sustainable because it does not spell out that any immediate action is required to be taken in the matter nor does the order on its face indicate that such action was indeed warranted.*" [Para 6]

11. Also, in the case of East West Freight Carriers (P) Ltd. v/s. Collector of Customs, Madras [1995(77) ELT 79 (Mad)] the Hon'ble High Court, Madras has held that, "*In the absence of any indication that there was application of mind by the Collector on the aspect as to whether immediate action was necessary, in my opinion, the impugned order cannot be sustained. The Collector gets jurisdiction to suspend that licence in cases where immediate action is necessary.*" [Para 9]

12. Though Customs House Agents Licensing Regulations, 1984 has been subsequently superseded by the Customs House Agents Licensing Regulations, 2004 and further vide Customs Brokers Licensing Regulations, 2013 and now Customs Brokers Licensing Regulations, 2018 is in effect, the power of suspension of licence of CHA/CB remains the same with additional provision of post decisional hearing and confirmation by the Commissioner. In other words, the prior ingredient of *'immediate necessity'* of suspension of a CB licence remained in the provision at the wisdom of the legislation and hence, the ratio of the judgements referred supra are squarely applicable to the facts of the present case .

13. We find that in the present order also, the Commissioner has not applied his mind on the aspect as to whether immediate action was necessary and thus, on this ground alone the order of continuation of suspension of the CB licence of the appellant fails.

14. Reliance has been rightly placed by the appellant in the case of International Cargo Agent v/s. Commissioner of Customs, Bangalore [2000(121) ELT 155 (Tribunal)] wherein in similar circumstances, a coordinate bench of this Tribunal has held as under :

> *"**7.** We have carefully considered these submissions and records of the case and we find that there is great force in the submissions of Ld. Advocate for the following reasons:-*
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> *(1) Since the invoices, packing list as well as the Exchange Control copy of the Shipping Bill (on reverse) all containing the declared value were signed by the exporter himself, therefore, it cannot be logically concluded that the present appellant as an agent of the exporter, was responsible for declaration of overvaluation, if any.*
>
> *(2) There has been a delay of more than three months and five days in suspension of the CHA licence, which has not been explained in the order impugned. On a consideration of the plethora of decisions on this issue, noted above, we are of the considered opinion that the law is now well settled to the effect that the drastic provisions of suspension of a CHA licence under the Regulation 21(2) shall be used only when there is an immediate need for the same. It necessarily follows that if suspension is invoked after a long period of time, which in this case is over 95 days, then this by itself is demonstrative of the fact that there was no immediate necessity found.*
>
> *(3) We also find from a perusal of the order impugned that except for mention of an earlier alleged infringement done by the appellant, there is no other grounds spelt-out therein which compelled the Ld. Commissioner to suspend the said licence. In this connection, we find that once the Tribunal vide final order noted above had*

absolved the appellant of all wrong doings by setting aside the order, again before the Tribunal the Commissionerate cannot take this as a precedential value by holding that appellant had in the past committed any gross irregularity. If this view is not taken, then the very purpose behind the adjudication of the issue by the Tribunal would be lost. Therefore, if this be so, then the present allegation can only be treated as vague.

(4) We are, therefore, of the considered opinion that since there has been abnormal delay in the issue of the order impugned from the date of cause of action, therefore following the ratio of the numerous decisions cited by both of the Hon'ble High Court of Calcutta & Madras as well as the Tribunal, we find that this delay in ordering suspension has fettered the issue and therefore the order impugned is liable to be set aside.

(5) We also find that the Tribunal in the case of MVT International v. CC as in 2000 (117) E.L.T. 258 (Tri.) = 2000 (36) RLT 799 (CEGAT) has held that over-invoicing is not an offence under Section 18(1)(a) of FERA, 1973 and therefore also not an offence under Section 11 of the Customs Act, 1962. In this decision, the Hon'ble Tribunal had also noted the decision of the Tribunal in the case of Shilpi Exports v. CC as in 1996 (83) E.L.T. 302 (T) which had not been interfered by the Hon'ble Apex Court on a Civil Appeal filed by Revenue as is reported in 1996 (88) E.L.T. A65. We are of the opinion that when such an over-invoicing does not lead to any penalty on the importers or confiscation of the goods being exported in the above decision, the suspension of a CHA licence in such an issue is not justified."

15. Moreover, apparently, the authorities have failed to complete the Regulation 17 proceeding within the time limit stipulated therein. The Hon'ble High Court, Calcutta has also found that the inquiry proceeding was completed without supplying relied upon documents to the CB and hence, the said inquiry report has been set aside by the Hon'ble High Court, Calcutta, as referred *supra.* On query, it is learnt that afresh inquiry proceeding is yet to be concluded by the newly

appointed Inquiry Officer. In such scenario, the suspension of licence of appellant cannot be allowed to continue since the same has irreversible civil consequences on the appellant/ CB.

16. In the above circumstance, we are of the considered opinion that there is no necessity to continue with the suspension of the CB licence any further. Justice may subserve and balance of convenience may be maintained by withdrawing suspension of the CB licence of the appellant and directing them to co-operate in the inquiry proceeding under Regulation 17 of CBLR, 2018. Hence, the proceeding of inquiry under Regulation 17 ibid shall continue in the case of the present appellant in accordance with law, but the authorities should not continue with the suspension of their licence.

17. We accordingly modify the impugned Order-in-Original dated 6.3.19 by setting aside the suspension of the CB licence of the appellant only. The other part of the Order-in-Original relating to proceeding under Regulation 17 of CBLR, 2018 shall continue in accordance with law. The Commissioner of Customs (Airport & Administration), Kolkata shall issue necessary order/circular immediately allowing operation of the CB licence of the appellant.

With the above observation and direction, the appeal is allowed partly.

(Order pronounced in the open court on 19 November 2020.)

SD/
(P.K.CHOUDHARY)
MEMBER (JUDICIAL)

SD/
(P.ANJANI KUMAR)
MEMBER (TECHNICAL)

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